THE PUBLISHERS ASSOCIATION

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS ON CREATIVE CONTENT ONLINE IN THE SINGLE MARKET

RESPONSE FROM THE PUBLISHERS ASSOCIATION TO THE PUBLIC CONSULTATION ON CREATIVE CONTENT ONLINE

29 February 2008

Executive Summary

The Publishers Association is the trade body representing consumer trade, academic and educational publishers in the UK. Our members represent approximately £4bn (€5.25bn) of the £5bn (€6.5bn) UK turnover in these sectors, whose overall contribution to the EU has been estimated at €22bn.

We warmly welcome the opportunity to comment on the Commission's work in this crucial area. Additionally, we support and endorse the submission of the Federation of European Publishers, to which we have contributed. We have also had the benefit of sight of the submissions of the Creative Media Business Alliance and the British Copyright Council, with whose submissions we substantially agree.

To avoid repetition, this submission does not re-rehearse at length material found in those other submissions; rather, we draw out a number of points particularly relevant to our specific sector.

The consultation prioritises four "horizontal challenges" deemed to merit EU level action:

- Availability of creative content online
- Multi-territory licensing
- Interoperability and transparency of DRMs
- Legal offers and piracy

There are some specific questions on the latter three of these on which we provide our views later in the document. Additionally, we seek to address the first point: publishers in the UK (and indeed across Europe) have invested heavily in making creative content available online, and are continuing to do so, proactively exploring different ways of bringing content to consumers.

A key point to draw out is the central importance of copyright to the development of the online market. The Copyright Directive (2001/29) prepared the ground for the digital marketplace, and strikes a fair balance between the needs of all stakeholders. We would strongly urge against any re-opening of the matters dealt with in the Copyright Directive. Rather, we consider that progress will be delivered by the evolution of new online business models.

Many different business models are being tried, some new, some more traditional, and at this early juncture there is no clear picture of the model or models that will be prevalent in a more mature market in online content. An obvious corollary is that a light touch in terms of regulation and intervention is the correct approach in the present climate.

The principle of contractual freedom arises several times in our submission, and we strongly believe that rightsholders must be free to licence their material as they see fit. Different business models will emerge and compete, and it is essential that they are allowed to do so in an open way.

Finally, as the consultation correctly identifies, online piracy is a clear and present threat and one that must be dealt with if the potential of the EU market is to be realised. All stakeholders bear a responsibility for addressing this, and at the present time the role of ISPs in particular merits attention.

Policy/Regulatory Issues for consultation

Availability of online content

Publishers in the UK have invested heavily in making creative content available online. The consumer trade has seen a number of false digital dawns, each of which has drawn heavy investment from the publishing sector. Educational and academic publishers routinely provide content online, through websites, Virtual Learning Environments and other mechanisms.

The most obvious way of making content available online is over the internet, and UK publishers have been digitising their archives for some time, with larger houses now having many thousands of works in their digital repositories. These repositories are being exploited in many different ways: through making excerpts available to search engines; through virally-marketed widgets on social networking sites; through search-inside-the-book enabled through commercial partnerships with search engines, online retailers and other third parties; and through extracts being republished by online retailers and others.

Additionally, publishers have worked hard to enhance the reading experience in many different ways. These include making short stories available exclusively on the web; “characters” from stories blogging as if they were real; author and other material podcasts; book trailers; book-specific microsites, online chat forums and games.

Publishers are also experimenting with user-generated content in a variety of different ways, varying from wiki-style sites where users create works through interactive reading group materials and interactive blogs featuring authors, booksellers and others.

At the time of writing, the consumer tipping point in terms of a reading device is yet to emerge. Competing technologies like Amazon’s Kindle reader and the Sony e-book reader, which are both expected to launch in the EU very soon, may – or may not – herald a revolution like the iPod brought to the music sector.

Notwithstanding this uncertainty, UK publishers have prepared extensive lists of ebooks, with thousands of ebooks in the consumer space and tens of thousands of ebooks in the academic, professional and scientific, technical and medical (STM) sectors. In these latter sectors the electronic delivery of content to users has been routine for a number of years; notwithstanding, models are continuing to evolve and publishers are investing heavily in innovative ways of bringing content to users.

Publishers have also invested in a number of internet start up ventures aimed at bringing content to users. Not all of these will work, but the willingness of publishers to experiment and to invest in the online content market is plain. Audible.com is a good example of a successful internet business that was started by publishers.

Finally, the audiobook sector is increasingly important, and UK publishers have again invested in making audio versions of their works available through Audible and through other channels.

The communication raises the important matter of orphan works; we have little to add on this matter to what is said by the Federation of European Publishers, whose response we fully endorse, other than to note that the UK industry is actively working with a number of other stakeholders to arrive at an industry solution, possibly through a collective licensing scheme.

Digital Rights Management

Q1 Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

Consumers want to access creative content online through a wide and ever-expanding range of platforms and systems, and the expectation is that this expansion will continue for some time yet, before consolidation to a small number of converged platforms follows. Different options for Technical Protection Mechanisms and different DRM models are being explored, mirroring the different business models being explored by rightsholders. DRM systems are key enablers of the emerging market(s) in creative content online and ensure that both creators and those who invest in them obtain fair reward.

In this environment, the appropriate action in our view at EU level is to support and encourage initiatives designed to create interoperability standards, especially where these are cross-sectoral i.e. apply equally well to content of different types (textual, graphical, audio-visual etc), as we believe that the consumer will in the long term not wish to distinguish between type of content and way of consuming it. It is unlikely that just one single model will emerge over time; equally it is important that the models which do emerge interoperate seamlessly and simply from the user's perspective, while providing rightsholders with the necessary safeguards.

Platform and device manufacturers bear a key responsibility in this to ensure that the systems they develop interoperate, especially in the context of convergence. In the publishing arena, a particular case in point is that the eBook readers shortly to be launched in the EU – Amazon's "Kindle" and Sony's eBook reader – do not support a common format, so that a user with one device is restricted to works available for it, rather than the whole marketplace of digitised works and material that is "born digital". This is in the interests neither of the publisher nor the consumer nor the author.

The EU Copyright Directive (2001/29) struck an appropriate balance between the needs of all the stakeholders in digital marketplaces, and indeed spoke of the need to ensure interoperability. A limiter to these marketplaces is the prevalence of online piracy, through peer-to-peer file-sharing and other mechanisms, and as below we would urge concrete action to encourage ISPs to take responsibility for their role in this illegal propagation of content.

Q2 Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in regard of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

In a converged world, to have multiple conflicting standards for conveying this information to consumers would be unhelpful. A cross-sector approach to ensure that the consumer has access to easily understood information about what they may and may not do with what they have purchased (or indeed what they are considering whether to purchase) should therefore be encouraged. We are working through the Federation of European Publishers with various consumer groups on this important issue. The region labelling of DVDs provides a good example of an established way of denoting DRM-related information that is readily understood by the consumer.

Q3 Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

Freedom of contract is particularly important in common law jurisdictions (e.g. English law), and we would strongly urge that this principle be maintained, to allow the emergence of new business models without undue interference. There is no evidence that existing contract law is defective, or that the current system is leading to any distortions or cross-border issues, or that the current system is having a detrimental effect on the development of the online market in creative content. Bad contracts can already be dealt with under Unfair Contract rules, and all EU contracts are subject to EU competition law, which works well.

So, while in general we would support the notion that any agreement (not just EULAs) should be worded in as simple and as legible a way as possible, we would urge against EU-level action to enforce this for EULAs over and above the present rules at this stage. Should any particular issues with EULAs emerge in the fullness of time, they can be dealt with in due course.

Q4 Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

Alternative Dispute Resolution mechanisms (ADRs) form a useful voluntary adjunct to existing routes for resolving disputes. It is important that bodies deemed competent should have the right level of ICT expertise and be entirely neutral. It is also important that parties retain the right to go through the normal courts if appropriate – ADRs must be voluntary – and that routes of appeal to the court system exist and are clearly laid down.

Q5 Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

We have nothing to add to the position of the Creative Media Business Alliance, which we endorse.

Multi-territory licensing

Q6 Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

No. We would strongly urge against such a step.

As above, it is critically important that contractual freedom be upheld, to allow new business models to emerge and compete with each other. Rightsholders should be free to licence their material as they see fit: different ways of doing so will develop, and any attempt to impose a single model at EU level would in our view be an error, which would risk stifling innovation and militate against the EU market in creative content online achieving its full potential.

An approach equally applicable to all types of creative content would be very hard to arrive at in practice – the management of rights varies widely across different kinds of content – and would in any event risk rapidly becoming obsolete, as technology, commercial practice and consumer demand continue to evolve.

Our industry, in collaboration with others, has developed a standard called Automated Content Access Protocol (ACAP), which is an automated framework for the expression of complex rights information across all content types. ACAP is not tied to any particular use or business model, but rather is a framework which enables allows rightsholders to specify permissions in a unified way, enabling future business models. Pilots have been run using ACAP to allow search engines to crawl behind firewalls, making content available in search results that would previously not have been visible. Manifold other uses of ACAP are possible, and support for this market-led project from the Commission is extremely welcome.

Q7 What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

We have no strong view on the licensing of AV works.

For English language consumer books, in modern author head contracts UK publishers generally seek to negotiate publication and distribution rights, including digital rights, across the whole EU (and not just in the UK or any other single territory).

So in terms of the creative content we deal with, EU-wide licensing is already the norm for new works, and no EU-level change is necessary or required to facilitate this.

We do not recognise any value in a distinction between primary and secondary multi-territory markets for the creative content in our scope.

Q8 Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)

Publishers have always recognised that some slower-selling niche or specialist works can often do better over the long term than quicker bestsellers: put simply, publishers with strong backlists do well. Individual and collective licensing arrangements already exist to make this material available and we would strongly argue that it is for rightsholders themselves to determine how best to exploit their backlist. These modes of exploitation are constantly evolving: the emergence of online bookstores (e.g. Amazon) and new technologies like print-on-demand are probably the two most notable recent changes in this area.

It is worth pointing out that "backlist" materials can suddenly acquire new value. For example, when the novel Atonement was made into a successful film, the book sold large numbers of new copies: a rather literary work suddenly became mainstream. When The Da Vinci Code became such a huge worldwide success, Dan Brown's other, older books were suddenly in great demand too. Publishers who have invested in creators and backlist should be free to make maximum use of such opportunities themselves.

Any attempt to impose "standard" terms at EU level would risk cutting across the considerable innovation taking place in this area (as well as running the risk of obsolescence as technologies and the business models they support continued to develop at an ever-accelerating pace).

Legal Offers and Piracy

Q9 How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

It is very important that we move beyond warm words to actual, tangible steps in this area. We agree with the Creative Media Business Alliance that "[clear] commitments should…truly encourage – rather than only call for – the emergence of new online services in a secure, legitimate and consumer-friendly environment".

For example, in the UK the Gowers Review of Intellectual Property (December 2006) specifically states that "[if] [industry agreement of protocols…between ISPs and rightsholders to remove and disbar users engaged in piracy] has not proved operationally successful by the end of 2007, Government should consider whether to legislate". In launching the next round of consultation in early 2008, the responsible minister (Lord Triesman) indicated that the Government would indeed legislate if industry did not provide its own solution.

The effective and committed engagement of all stakeholders is important in the discussion and development of a range of responses, from criminal or civil sanctions (which should only be used when necessary and in line both with the EU Enforcement Directive and TRIPS), to effective notice-and-take-down procedures which ISPs administer. It is important that implementations of the Enforcement Directive allow this choice and do not simply mandate a criminal action where a civil one might be more appropriate.

There is a general point: while the Telecom Package remains open, there is an opportunity to include in it the requirement for ISPs to inform their customers about copyright and the consequences of infringement. Such a requirement has no discernable downside and could only help tackle the problem of online piracy.

Q10 Do you consider the Memorandum of Understanding, recently adopted in France, as an example to follow?

The French Memorandum of Understanding (MoU) is a very useful example of how matters concerning compliance at the ISP level can be addressed in practice. It is a comprehensive arrangement aimed at stimulating legitimate content while opposing piracy both through effective enforcement and, importantly, education.

However, it should also be recognised that other solutions might be preferable elsewhere in the EU, and further that some aspects of the MoU may not be equally applicable to all content sectors. For example, the proposal on the withdrawal of DRMs may make perfect sense in the audiovisual and music sectors, but does not sit well with the publishing sector (which is not in the scope of the MoU – separate discussions are currently under way in France aimed at arriving at a solution for the publishing sector).

These comments should not be taken to detract from our strong support for the French approach in terms of getting all stakeholders to come to the table and reach agreement, which we warmly applaud. We would simply observe that one size does not fit all in this context, and different member states may wish to arrive at different styles of agreement from the French MoU.

Q11 Do you consider that applying filtering measures would be an effective way to prevent online copyright infringement?

No filtering would prevent all online piracy, but effective filtering to limit it should be one stratagem developed by ISPs going forward. Content recognition techniques which would enable this are becoming available. Peer-to-peer and other illicit sharing of copyright material should ultimately be treated in a similar way to virii and spam: a shared problem against which all legitimate stakeholders must work in consort. The kind of partnerships which have evolved in the US regarding User Generated Content (see www.ugcprinciples.com) are a good example of how this can work in practice; in June 2007 the Brussels Court of First Instance ordered Scarlet (an ISP) to implement a filtering solution to address peer-to-peer piracy.

Other benefits to the EU's infrastructure would also accrue: legitimate traffic across broadband networks has to compete with unlawful internet traffic, and to reduce the volume of the latter would mean increased bandwidth available to all subscribers.

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